

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

No. 75-4266

United States Court of Appeals

FOR THE SECOND CIRCUIT

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

TWIN EXPRESS, INC.,

Intervenor,

and

CONSOLIDATED EXPRESS, INC.,

Intervenor,

and

TRUCK DRIVERS UNION LOCAL 807, IBT,

Intervenor.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCE-
MENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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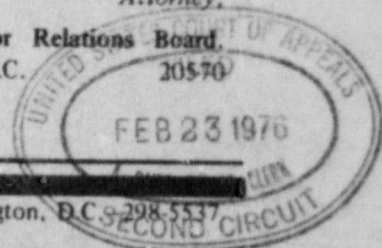
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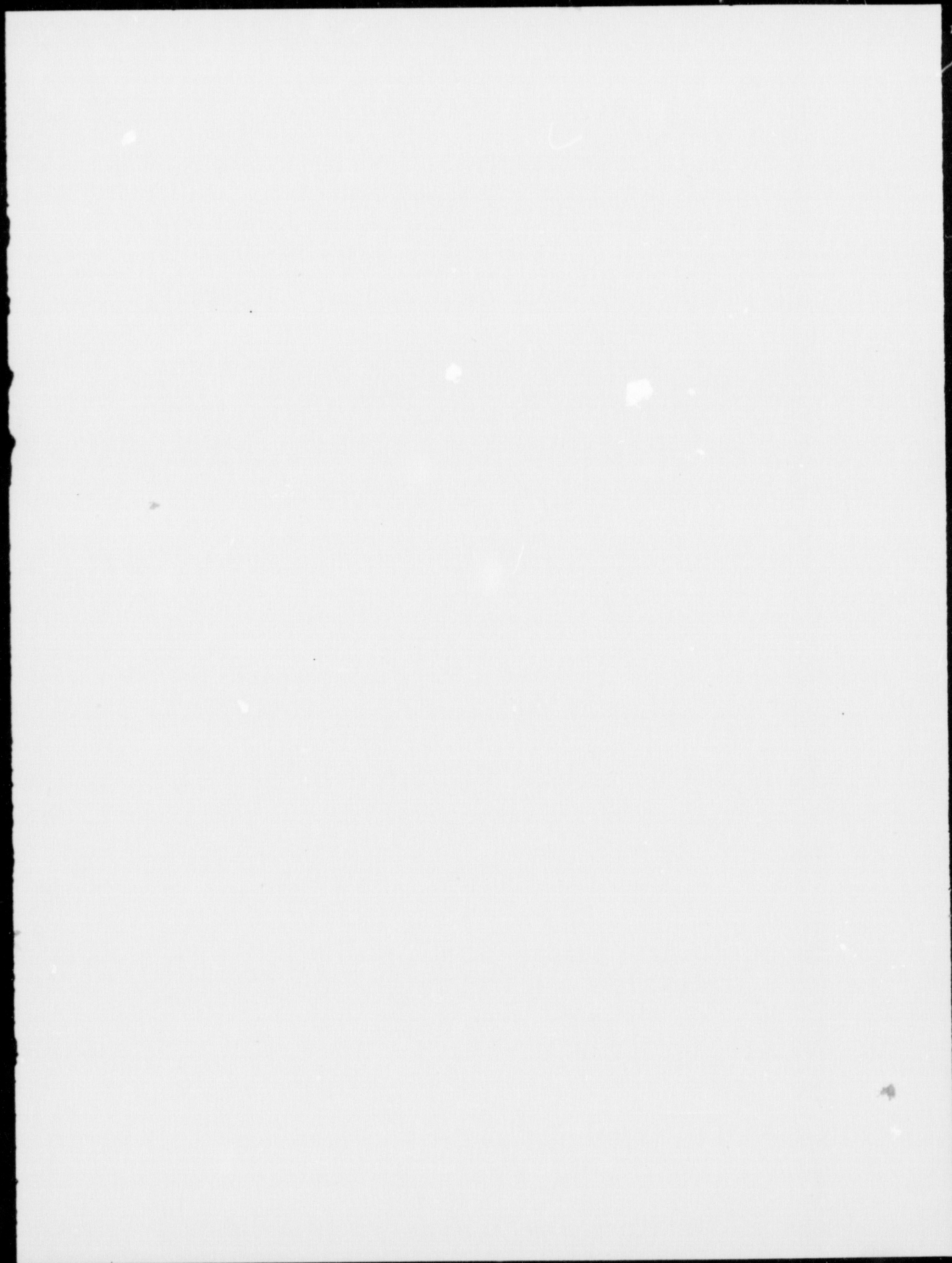
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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether substantial record evidence supports the Board's finding that the New York Shipping Association and the International Longshoremen's Association violated Section 8(e) of the Act by maintaining, giving effect to, and enforcing the Rules on Containers.

2. Whether substantial record evidence supports the Board's finding that the International Longshoremen's Association violated Section 8(b)(4)(ii)(B) of the Act by threatening to assess, and by assessing liquidated damages against certain employer-members of the New York Shipping Association, as provided for in the Rules on Containers, thereby threatening, restraining, and coercing the New York Shipping Association and those members, with an object being to force those persons to cease doing business with Consolidated Express and Twin Express.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the joint petition of the International Longshoremen's Association, AFL-CIO, and the New York Shipping Association, Inc. ("ILA" and "NYSA," respectively) to review and set aside an order issued against them by the National Labor Relations Board on December 4, 1975, and upon the Board's cross-application for enforcement of its order. The Board's Decision by Chairman Murphy and Members Fanning, Jenkins and Penello is reported at 221 NLRB No. 144 (A. 186-206).¹ This Court has jurisdiction under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151, *et seq.*), the unfair labor practices having occurred in New York City, New York, and Newark, New Jersey (A. 201). Consolidated Express, Inc. ("Consolidated") and Twin Express, Inc. ("Twin"), the charging parties before the Board, and Truck Drivers Union Local 807, IBT ("Local 807") which represents Consolidated's employees, have intervened.

¹ "A." references are to the pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

I. THE BOARD'S FINDINGS OF FACT

The following findings of fact are based on a stipulated record which consists of the records compiled in two related injunction proceedings (successfully brought against NYSA and ILA by the Board, pursuant to Section 10(1) of the Act, in the United States District Court of New Jersey)² and supplemental affidavits submitted to the Board by the parties (A. 53-60).

A. Consolidated and Twin employees stuff and strip containers for their employers' customers

Consolidated and Twin are non-vessel-owning common carriers ("NVOCC") or freight "consolidators", which bring together small shipments so that they may be more economically handled by cargo vessels (A. 134, 187; 711, 725). In 1965, Consolidated succeeded to the off-pier consolidation operations begun by Valencia-Baxt Express, Inc., ("Valencia") in 1949; Twin entered the consolidation business in 1967 (A. 134, 152, 157, 188; 105, 711, 768, 780, 785-786, 794). Prior to August 1973, Consolidated contracted with United States Trucking Company, whose employees were represented by Local 807, to perform its consolidation and trucking operations, but since then its own employees also represented by Local 807 have performed that work (A. 153, 188; 105, 726-727). Twin utilized unrepresented employees provided by two trucking companies to perform its operations prior to 1969, but since that year its own employees represented by another Teamsters local, as well as the employees of a trucking company who are represented by Local

² *Balicer v. ILA and NYSA*, 364 F.Supp. 205 (D.C.N.J., 1973), aff'd 491 F.2d 748 (C.A. 3, 1973); *Balicer v. ILA and NYSA*, 86 LRRM 2559 (D.C.N.J., 1974).

807, have done the bulk of Twin's consolidation and delivery work (A. 157-158, 188; 711-713).

Consolidated and Twin have operated off-pier consolidation facilities located within 50 miles of the Port of New York for about a decade (A. 130, 187). Their employees consolidate less-than-container-load ("LCL") and less-than-trailer-load ("LTL") cargo which has been sent to the facilities by the consolidators' customer-consignors for shipment in containers between New York and Puerto Rico (A. 134, 187; 711, 713, 724-725, 729, 837). The cargo is systematically stacked or "stuffed" into 40-foot long containers or trailers supplied to the consolidators by the steamship companies serving Puerto Rico (A. 134, 187; 725). When the container is filled, its doors are shut and a numbered seal is placed through the door handle by the consolidator's employee. The seal must be broken to remove the freight. The sealed container then is trucked several miles from the off-pier facility to the pierside area of the NYSA-member steamship line (A. 134, 187; 712, 725). The facilities of Consolidated and Twin are in Maspeth, Queens, and Manhattan, respectively, and the container ships involved in the Puerto Rico trade dock in New Jersey and Staten Island (A. 135, 153, 157; 85, 105, 711, 725, 728, 954). The consolidator also prepares the required shipping documents and forwards them with the trailer (A. 403).

At the dock the steamship company's ILA-represented longshoremen load the container onto the ship bound for Puerto Rico (A. 187; 730). When a ship arrives in New York from Puerto Rico, the incoming container is unloaded from the vessel by longshoremen and trucked by the consolidator's employee to its off-pier facility, where the cargo is

removed or "stripped" from the container, separated and then delivered to the ultimate consignee (A. 135, 187; 712, 725, 795).

Containerized LCL and LTL cargo is transported by the container lines under the Freight-All-Kinds ("FAK") shipping tariff. This shipping rate applies only if the cargo is handled — that is, stuffed and stripped — at the consolidator's off-pier facility and at his expense and risk (A. 593, 901, 1104, 1106-1107, 1108). Since the container remains sealed at the pier prior to and after shipment, the line's liability for loss due to damage or theft is limited to \$500 per container (A. 740). From the steamship company's viewpoint, the "cargo" is the container, not the individual pieces of LTL or LCL freight.

B. ILA bargains with NYSA on behalf of longshoremen whose traditional and principal work in the Port of New York is to load and unload ships

Neither Consolidated nor Twin has ever belonged to NYSA, an incorporated association of employers engaged in various operations involving the shipment of cargo and the transportation of passengers in and out of the Port of New York (A. 130, 134, 188; 713). The NYSA conducts collective-bargaining negotiations and enters into bargaining agreements on behalf of its members with ILA (A. 131, 188). The ILA represents longshoremen and related craftsmen whose traditional and principal work has been to load and unload ships belonging to NYSA members in the Port of New York (A. 189). In 1970, NYSA joined the Council of North Atlantic Shipping Associations ("CONASA"), an association which represents constituent shipping associations operating in ports from

Massachusetts to Virginia (A. 131, 189; 862-863). Since 1970, CONASA has bargained with ILA over certain key issues, including containerization, on a master-contract basis (A. 131; 863).

The membership of NYSA includes steamship lines which carry cargo and passengers on their vessels and stevedoring companies which employ longshoremen to load and unload ships (A. 897). Sea-Land Service, Inc., Seatrain Lines, Inc., and Transamerican Trailer Transport, Inc. ("Sea-Land," "Seatrain," and "TTT," respectively) are the three NYSA members who operate specially designed container ships between New York and Puerto Rico (A. 135, 188-189; 728-729). Consolidated ships its customers' containerized cargo using all three lines; Twin uses only Sea-Land and TTT (A. 135, 189; 712, 728, 1129). Because the container ships can carry only certain kinds of specially-designed containers or trailers, the ship lines must furnish their empty containers to the consolidators, or handle compatible containers supplied by others, such as railroads (A. 728). Twin and Consolidated can use the lines' transport services only if provided with such containers (A. 135, 136, 189).

C. From the advent of containerization, ILA-labor has stuffed containers only for NYSA members' customers, and non-ILA labor has handled only consolidators' customers' cargo

In the decades prior to World War II, virtually all solid cargo moving over the New York docks was handled on a piece-by-piece basis by longshoremen represented by ILA (A. 132, 143; 842-843, 982-984, 1067-1068). Truckmen delivered loose cargo to the pier and removed it from their vehicles, and longshoremen then placed the cargo on drafts or pallets, or into small

boxes prior to loading it aboard ship (A. 143; 63-64, 71, 81, 843). Cargo from incoming ships was broken down by longshoremen and picked up at the pier by truckmen who delivered it to the ultimate consignee (A. 143; 62-63, 71, 79-80).

In the late 1940's and early 1950's loose cargo came to be stuffed into 8-foot long wooden boxes called Dravo containers and 20-foot long metal containers for shipment to and from Puerto Rico (A. 143, 190; 843, 847-848, 984-985, 1068-1069, 1072). During this period, LTL cargo received by Valencia from its customers was consolidated into these types of boxes and containers at its off-pier facility by Valencia's employees (A. 102, 105, 794). The containers then were trucked by Valencia to the pier and placed directly aboard ship by longshoremen for shipment to Puerto Rico (A. 65, 72-75, 111). At the same time, when necessary to perform their traditional and principal loading and unloading work, longshoremen stuffed and stripped boxes and containers on the piers (A. 197; 87, 845, 1144, 1148). The cargo thus handled by longshoremen was that sent directly to the pier in loose or bulk form by the lines' customers (A. 845, 848).

D. The 1959 agreement

In the mid-1950's the use of large containers spread with the introduction of container ships in the Puerto Rico run (A. 75, 85, 849, 991, 1039-1040, 1069-1070, 1086, 1143). In 1958, ILA struck NYSA to protest their use (A. 144, 190; 848, 990). The 1959 agreement settling that strike ensured that there would be no restriction by ILA on the handling of any type of container by NYSA-member steamship lines or stevedoring companies,

including consolidator-stuffed LTL and LCL containers (A. 884, 889, 890). In exchange for ILA's abandoning its claim to perform such work exclusively at pierside, NYSA agreed to pay into a jointly-administered fund, a royalty on containers stuffed or stripped away from the pier by non-ILA labor — that is, NYSA paid into the fund for each consolidator's LCL or LTL container stuffed or stripped away from the pier which ILA labor loaded or unloaded directly aboard ship. NYSA further agreed that ILA labor would perform all container work done by NYSA members for their own account, whether performed at the pier or by NYSA members' subcontractors.

The text of the pertinent sections of the 1959 contract is as follows (A. 208-209):

Section 8. Containers — Dravo Size or Larger.

- a. Any employer shall have the right to use any and all type of containers without restriction or stripping by the union.
- b. The parties shall negotiate for two weeks after the ratification of this agreement, and if no agreement is reached shall submit to arbitration . . . the question of what should be paid on containers which are loaded or unloaded away from the pier by non-ILA labor^[3]
- c. Any work performed in connection with the loading and discharging of containers for employer members of NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

³ A three-man arbitration panel, over the dissent of ILA's representative, subsequently established the rate for the royalty payment based on the container's gross tonnage and the type of vessel in which it sailed (A. 330, 374).

E. ILA-labor follows the 1959 agreement until early 1973

For 14 years, from 1959 to 1973, and consistent with ILA's continuing obligation under Section 8 of the 1959 agreement and its successors, *supra*, ILA-represented longshoremen loaded first Valencia and then Consolidated and Twin containers directly aboard ship without rehandling at pierside the already-consolidated LCL or LTL cargo (A. 154-155, 158, 191; 243-244, 397-398, 719, 730-731, 745, 1027, 1029, 1032, 1035, 1039-1040, 1052-1053, 1140, 1155). Thus, when stuffed containers were delivered to Sea-Land, Seatrain, or TTT, the longshoremen did not strip the cargo from them and then restuff it into the same or a different container (A. 113, 1032). Incoming containers also crossed the New York docks without rehandling.

Limited stripping and restuffing was performed by longshoremen at times coinciding with contract negotiations to bolster ILA's bargaining position (A. 154, 190-191; 741, 804, 864). For about three weeks in 1966 or 1967, longshoremen employed by Sea-Land and Seatrain rehandled Consolidated's containers, and intermittently over a period of months around the time that the ILA contract was up for renewal in 1971, Sea-Land's longshoremen rehandled 20 to 25 of the 1200 containers Consolidated shipped with Sea-Land that year (A. 155-156; 741-744, 789). Twin's containers were rehandled by ILA personnel during two brief periods in 1968 and 1971, but these episodes ceased when Twin complained to the steamship companies (A. 158; 713, 718).

F. The 1969 Rules on Containers

In 1967, NYSA-member steamship companies introduced the first fully containerized ships, specifically designed and constructed to carry

large, 40-foot long containers (A. 132, 146, 190; 1016). The ILA became concerned that loading and unloading work opportunities for its members, including those working for stevedoring companies, would be diminished as fewer cargo units came to handle the same amount of freight (A. 190). In 1967, ILA demanded that its longshoremen stuff and strip *all* containers crossing the piers, and it supported this position by rehandling consolidators' containers for a short period, *supra* (A. 146, 191; 68-69, 854, 901, 1017). When negotiations between ILA and NYSA foundered over this issue in 1968, ILA struck for 57 days and the national emergency provisions of the Act were invoked by the President to reopen the docks (A. 147, 191; 214, 854, 894, 1017). Subsequently, NYSA agreed to resolve this impasse by making an exception "to the present contractual rights of the employers to use any and all types of containers without restriction by the union" (A. 893-894, 1057).

In February 1969, detailed provisions governing containerization -- the so-called Rules on Containers -- were agreed upon, and since then have appeared in every NYSA-ILA contract, with certain modifications, *infra*, pp. 12-13. The thrust of the Rules on Containers was to establish a system under which ILA-represented longshoremen working at the piers were to strip and restuff all LCL and LTL cargo in containers owned or leased by NYSA members and originating within 50 miles of the Port of New York, whether or not the containers required further rehandling -- that is, even if they already had been stuffed off the pier by consolidators and thus were ready for immediate sailing. If the steamship line failed to have its longshoremen perform such "make-work," the line was subject to pay \$250 liquidated damages into the Container Royalty Fund. The relevant sections of the Rules on Containers are as follows (A. 147-149, 247-250):

Rule 1. Definitions and rule as to containers covered.

- Stuffing - Means the act of placing cargo into a container.
- Stripping - Means the act of removing cargo from a container.
- Loading - Means the act of placing containers aboard a vessel.
- Discharging - Means the act of removing containers from a vessel.

These provisions relate solely to containers meeting each and all of the following criteria:

- (a) Containers owned or leased by employer-members (including containers on wheels) which contain LTL loads or consolidated full container loads.
- (b) Such containers which come from or go to any person (including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.
- (c) Such containers which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

Rule 2. Rule of stripping and stuffing applies to such containers.

A container which comes within each and all of the criteria set forth in Rule 1 above shall be stuffed and stripped by ILA longshore labor. Such ILA labor shall be paid and employed at longshore rates under the terms and conditions of the General Cargo Agreement. Such stuffing and stripping shall be performed on a waterfront facility, pier or dock. No container shall be stuffed or stripped by ILA longshore labor more than once. Notwithstanding the above provisions, LTL loads or consolidated container loads of mail, of household goods with no other type of cargo in the container, and of personnel effects of military personnel shall be exempt from the rule of stripping and stuffing.

Rule 3. Rules on No Avoidance or Evasion.

* * * * *

(e) Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules, then the steamship carrier shall pay, to the joint Container Royalty Fund liquidated damages of \$250 per container which should have been stuffed or stripped. Such damages shall be used for the same purposes as the first Container Royalty is used in each port. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in (g) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

* * * * *

G. The 1973 Dublin Supplement to the Rules on Containers

ILA labor did not strip and restuff Consolidated and Twin containers supplied to them by NYSA-member steamship lines between 1969 and early 1973 despite promulgation of the Rules on Containers, *supra* (A. 156).⁴ Some liquidated damage penalties were imposed, and, in 1970, the levy was increased to \$1000 per container (A. 193; 261, 859, 861).

⁴ ILA-represented checkers employed on the piers by NYSA-member steamship lines and stevedoring companies sought to create the impression of compliance with the Rules during this period by removing the consolidator's seals and replacing them with the steamship carrier's seals, and by affirming on certain shipping documents that the container had been stripped and restuffed, but, in fact, no stripping and restuffing took place (A. 154; 298-299, 318-321, 717, 906, 930, 964, 968, 972, 980, 1152-1153, 1155-1156).

In early January 1973, ILA and CONASA representatives meeting in Dublin, Ireland, clarified and created a means to enforce the Rules by executing the so-called Dublin Supplement to the Rules (A. 150, 193; 876-877). The thrust of the Dublin Supplement was to bring all off-pier LCL and LTL consolidation work performed by non-ILA labor to the piers where ILA labor would consolidate LCL and LTL cargo. The supplement mandated that all consolidated LCL and LTL cargo outbound from New York had to be stripped from the consolidator's container at the line's expense by ILA labor at the pier, and restuffed into a different container before loading aboard ship, or else liquidated damages were to be assessed. To prevent evasion of this rule, steamship lines were forbidden to supply empty containers to off-pier consolidators who attempted to operate as they had in the past. ILA labor also was to strip inbound LCL and LTL cargo from the container and to place it loose on the pier where it was to be picked up by the consolidator. Finally, ILA labor at the pier also was to strip and restuff containers neither owned nor leased by NYSA members — that is, so-called "foreign" containers owned by railroads and others, and supplied to the consolidator (A. 198-199).⁵ In pertinent part, the Dublin Supplement provided (A. 193-194):

* * * * *

⁵ Rule 3, par. (f), of the Rules on Containers provides (A. 199):

(f) If any shippers or their agents who have at any time used, are now using, or in the future use containers owned or leased by employer-members, hereafter use containers not owned or leased by employer-members, for the purpose of evading the provisions of Rule 2 hereof, then the containers so used shall be considered to be within Rule 1 and Rule 2.

Enforcement of Rules on Containers.

* * * * *

1. (a) All outbound (export) consolidated or LTL container loads (Rule 1 containers) shall be stripped from the container at pier by deepsea ILA labor and cargo shall be stuffed into a different container for loading aboard ship.

1. (b) All inbound (import) consolidated or LTL cargo (Rule 1 containers) for distribution shall be stripped from the container and the cargo placed on the pier where it will be delivered and picked up by each consignee.

2. No carrier or direct employer shall supply its containers to any facilities operated in violation of the Rules on Containers including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder who is either a consolidator or a distributor. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all containers be stuffed or stripped at a waterfront facility (pier or dock) where vessels normally dock.

A list shall be maintained of consolidation and distribution stations which are operated in violation of the Rules for the information of all carriers and direct employers. Any container consolidated at or distributed from such facilities shall be deemed a violation and subject to the rules on stuffing and stripping.

* * * * *

H. Sea-Land, Seatrain, and TTT cease doing business with Consolidated and Twin

Sea-Land and Seatrain stripped and restuffed containers sent to them by Consolidated and Twin from early February 1973 until mid-March as

required by the Dublin Settlement (A. 157, 194; 719, 745-746). At that time, rather than either continuing to pay wages to ILA-labor for this work or paying substantial liquidated damages, Sea-Land and Seatrain on March 15 and 25, respectively, stopped supplying empty containers to Consolidated, and on March 21 Sea-Land did the same with respect to Twin (A. 151, 194; 719, 753-754, 757, 767, 1026).⁶ Sea-Land was assessed about \$60,000 liquidated damages by ILA for Consolidated containers it handled prior to March 21, and it and Seatrain each paid more than \$100,000 for all violations during this period (A. 151; 762, 878, 882). TTT also rehandled Consolidated and Twin containers beginning in early March but less systematically than the others; it too was assessed a penalty for violating the Rules (A. 151; 752, 925). TTT stopped supplying its own containers in April, but it did ship "foreign" trailers leased from railroads which did not carry TTT's name. However, these containers were stripped and restuffed by ILA labor at the piers (A. 151, 157, 194; 715, 719, 765-767, 836, 1177).

On April 13, 1973, NYSA and ILA issued a joint notice to all NYSA members, announcing that steamship lines had been assessed liquidated

⁶ In April 1973, Sea-Land issued proposed tariff rules which adopted the Rules on Containers and obligated consolidators to pay the labor charge for shipping and restuffing their containers, and to reimburse the line whenever a \$1000 penalty was assessed against the consolidator's container. Sea-Land's successor, Puerto Rico Maritime Shipping Authority, adopted the proposed tariff in late 1974. On October 9, 1975, a Federal Maritime Commission Administrative Law Judge found that the proposed tariff rules on containers were "unlawful in violation of section 14 Fourth, 16 First and 18(a) of the 1916 [Shipping] Act, and of section 4 of the 1933 [Shipping] Act." *Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc. - Proposed Rules on Containers* (No. 73-17) and *Puerto Rico Maritime Shipping Authority - Proposed Rules on Containers* (No. 74-40). That case now is pending before the Federal Maritime Commission and, we have been advised, a decision can be expected in May or June (A. 677-682, 754-755).

damages for violating the Rules with respect to containers stuffed or stripped at the premises of 14 named consolidators, including Consolidated and Twin (A. 152, 194; 524-525).

I. The Board obtains injunctions against enforcement of the Rules of Containers

On June 1, 1973, Consolidated filed unfair labor practice charges with the Board alleging that ILA had violated the secondary boycott provisions of the Act (Section 8(b)(4)(ii)(B)) and that ILA and NYSA had violated the Act's prohibition against "hot cargo" agreements (Section 8(e)) by maintaining and enforcing the supplemented Rules on Containers (A. 137). A consolidated complaint issued on August 23 (A. 137). At the same time, the General Counsel initiated a proceeding pursuant to Section 10(1) of the Act to obtain a preliminary injunction against enforcement of the Rules pending final disposition of the charges by the Board. United States District Judge Frederick B. Lacey of the District of New Jersey held extensive hearings in late August, and on September 18 he issued the requested temporary injunction, finding that the Board's legal theory of the case "is substantial and not frivolous" and that "the Board had reasonable cause to believe that the charged violations did occur." *Balicer v. ILA*, 364 F.Supp. 205, 217, 226 (1973). Judge Lacey's decision was appealed to the Court of Appeals for the Third Circuit by ILA and NYSA, and, on December 20, that court affirmed without opinion. 491 F.2d 748. A. 137-138.

Meanwhile, on November 2, 1973, Twin filed charges alleging violations by ILA and NYSA of the same sections of the Act and a complaint

issued on January 3, 1974. On January 11 the General Counsel moved to consolidate the two cases before the Board and that motion was granted by the Administrative Law Judge on January 23. As in the earlier case, the General Counsel sought and obtained an injunction under Section 10(1) from Judge Lacey, whose decision issued on April 19. *Balicer v. ILA*, Docket No. 1811-73, reported at 86 LRRM 2559. A. 140-141.

The consolidated cases subsequently were submitted to the Administrative Law Judge for "decision and recommendations" based on a Stipulation which provided that the record before the Board would consist of the records in the two injunction proceedings and supplemental affidavits (A. 53-60). Local 807 was permitted to intervene in the Board proceeding (A. 140; 55).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board unanimously concluded, contrary to the Administrative Law Judge,⁷ that ILA and NYSA had violated Section 8(e) of the Act by maintaining, giving effect to, and enforcing the Rules on Containers, as supplemented in 1973, and that ILA had violated Section 8(b)(4)(ii)(B) of the Act by threatening to assess and by assessing liquidated damages against Sea-Land, Seatrain, and TTT, which conduct threatened, restrained

⁷ The fact that the Board disagreed with the Administrative Law Judge's ultimate conclusions affords no basis for rejecting the Board's findings, since the Board simply drew different inferences and conclusions from the same evidence. Under these circumstances, this clearly is a case "where the presumptively broader gauge and experience of members of the Board have a meaningful role." *Oil, Chemical & Atomic Workers International Union, Local 4-243, etc. v. N.L.R.B.*, 362 F.2d 943, 946 (C.A.D.C., 1966). Therefore, the Judge's ultimate legal conclusions are not entitled to any special weight. See *Sign and Pictorial Union Local 1175, etc. v. N.L.R.B.*, 151-152, 419 F.2d 726, 733-734 (C.A.D.C., 1969); *N.L.R.B. v. A.P.W. Products, Inc.*, 316 F.2d 899, 903-904 (C.A. 2, 1963).

and coerced NYSA and those steamship lines with an object of forcing them to cease doing business with Consolidated and Twin (A. 201).

The Board's order requires ILA and NYSA to cease maintaining, giving effect to, and enforcing the Rules on Containers, as supplemented, to the extent and in the manner the Rules have been found to be unlawful, and to cease maintaining, giving effect to, and enforcing any other contract or agreement, express or implied, likewise violative of Section 8(e). The order also requires ILA to cease threatening, coercing, or restraining NYSA or any of its employer-members, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with Consolidated or Twin. Affirmatively, the order requires ILA, in addition to posting the appropriate notices, to notify its NYSA-employed members that ILA has no objections to loading or unloading containers that have been stuffed, or are to be unstuffed, by Consolidated or Twin, and that any previous instructions, requests, or appeals to its members to strip and restuff Consolidated and Twin containers have been withdrawn and are to have no force or effect. Finally the order requires ILA to notify its members that the Rules on Containers, as supplemented, have been found void and unenforceable with respect to Consolidated and Twin. The order also requires NYSA to give similar notices to its employer-members (A. 201-206).

SUMMARY OF ARGUMENT

As petitioners concede, the NYSA-ILA Rules on Containers obligate NYSA-member container ship operators to cease doing business with a

class of their customers — namely, off-pier consolidators such as Consolidated and Twin. The Rules violate Section 8(e) of the Act because their objective is to acquire for the ILA-represented longshoremen's bargaining unit the work of stuffing and stripping containers for consolidator's customers which consolidator's employees outside the ILA unit always have performed and which bargaining unit employees have never performed.

The precise work in controversy is the stuffing and stripping of LCL and LTL containers for consolidator's customers. Longshoremen have stuffed and stripped cargo at the pier for the container ship operator's shippers, but they have never performed such work for shippers using off-pier consolidators. Rather, from the advent of containerization through the present, consolidators have generated this business themselves. And they have used employees outside the longshoremen's unit, usually represented by the Teamsters, to stuff and strip containers off the piers for their customers prior to transport by the container ship operators.

In addition, in 1959, when the modern practice of containerization already had become established in the Port of New York, ILA abandoned any claim it might then have had to perform stuffing and stripping for consolidators at the piers. For the next 14 years, ILA-represented longshoremen loaded consolidator-stuffed containers directly aboard the container ships without rehandling the cargo therein on the piers.

In sum, as we show below, the Rules unlawfully attempt "to acquire work which unit employees had never performed or work which they may have performed in the past but have completely lost before the clause was

negotiated." *American Boiler Manufacturers Ass'n v. N.L.R.B.*, 404 F.2d 547, 552 (C.A. 8, 1968), cert. denied, 398 U.S. 960 (1970).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE NEW YORK SHIPPING ASSOCIATION AND THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION VIOLATED SECTION 8(e) OF THE ACT BY MAINTAINING, GIVING EFFECT TO, AND ENFORCING THE RULES ON CONTAINERS

A. The scope of Section 8(e)

Section 8(e) of the Act makes it an unfair labor practice for a labor organization and an employer:

to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into theretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

As the Supreme Court explained in its landmark decision construing that section, *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612, 633-634 (1967), Section 8(e) was designed to implement and reinforce the existing proscriptions against secondary boycotts contained in Section 8(b)(4)(B) of the Act.⁸ These proscriptions, in turn,

⁸ Section 8(b)(4)(ii)(B), the portion of section 8 (b)(4)(B) involved in the instant case, makes it an unfair labor practice for a union to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an objective thereof is:

[footnote continued]

were designed to confine the area of industrial disputes to the parties immediately concerned, and to prevent their extension to employers and employees not directly involved: they were aimed at "shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B. v. Denver Bldg. and Constr. Trades Council*, 341 U.S. 675, 692 (1951).

Sections 8(b)(4)(B) and 8(e) thus complement each other, Section 8(b)(4)(B) prohibiting union action or conduct with an object of achieving a secondary boycott, and Section 8(e) banning hot cargo agreements obligating an employer to cease doing business with any other person. Thus, as the Supreme Court has explained, Congress intended that Section 8(e) would embody the same distinction made in Section 8(b)(4)(B) between lawful "primary" and unlawful "secondary" boycott activity and would apply only to agreements having "'secondary' objectives." *National Woodwork, supra*, 386 U.S. at 620, 623-639. Congress, the Court concluded, "had no thought of prohibiting agreements directed to work preservation." *Id.* at 640. Hence, the general test for determining the legality of a "hot cargo" agreement under Section 8(e) is "whether under all the surrounding circumstances"⁹ the particular agreement or its maintenance "is addressed to the labor relations of the contracting employer *vis-a-vis* his own

[footnote continued from preceding page]

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any person . . . ; *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, any primary strike or primary picketing

⁹ The pertinent circumstances which the Board considered here "include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry." *Id.* at 644, n. 38.

employees" or is "tactically calculated to satisfy union objectives elsewhere," *Id.* at 644-645; *Houston Contractors Association v. N.L.R.B.*, 386 U.S. 664, 668 (1967).

This general test "is simple to state but difficult to decide" (*N.L.R.B. v. National Maritime Union of America, AFL-CIO*, 486 F.2d 907, 910 (C.A. 2, 1973), cert. denied, 416 U.S. 970), the cases, as here, principally focusing "on the [labor contract] provision *per se* and the circumstances surrounding the parties' agreement to its terms." *Sheet Metal Workers, Local 223 v. N.L.R.B.*, 498 F.2d 687, 693 (C.A. D.C., 1974). See also, *National Woodwork, supra*, at 645. As the court observed in *Sheet Metal Workers, supra*, Section 8(e) poses the following question for the Board:

Under the circumstances existing at the time the contractual provision in controversy was signed, was the object of the provision *preservation of fairly claimable work for members of the bargaining unit*, a primary objective? Or was the goal to use the contracting employer as a pawn in the union's labor disputes with other employers? Resolution of this ultimate issue presupposes answers to two preliminary questions:

1. What is the relevant bargaining unit?
2. In connection with the operation or project of the contracting employer, which jobs are *fairly claimable* by the Union? Or, in *National Woodwork* terms, in which jobs does the union have a *valid work preservation interest*? (Emphasis in original.)

And, here, as the Board explained in finding that the Rules on Containers did not have a lawful work preservation objective (A. 195-196):

If ILA's activities and its agreements with NYSA were designed to preserve work to which ILA-represented employees working in the Port of New York were entitled, then both the activities and the contractual agreements would be primary in purpose and, therefore,

would not be unlawful. However, if ILA's real object was to obtain either work *traditionally performed by employees not represented by ILA* or work to which ILA has abandoned all claims, then the pressures on NYSA members and the contractual arrangements would have a secondary object and would violate Section 8(b)(4)(ii)(B) and 8(e), respectively. (Emphasis added).

B. The Rules on Containers, on their face, require the steamship lines to cease doing business with consolidators

Initially, neither NYSA nor ILA deny that, on their face, the Rules on Containers, as first agreed upon in 1969, and as supplemented in 1973, contain a clear "cease doing business" requirement. For the Rules require NYSA-member steamship companies and stevedores to use ILA-labor exclusively at the pier to stuff and strip all qualifying containerized cargo crossing the Port of New York and to strip and restuff all consolidators' containers. The Rules also prohibit the lines from "supply[ing] . . . containers to any facilities operated in violation of the Rules on Containers including but not limited to a consolidator who stuffs containers of out-bound cargo or a distributor who strips containers of inbound cargo. . . ." (A. 199). But because the consolidators' off-pier facilities are staffed with non-ILA labor, they never can be operated in compliance with the Rules, and, hence, these NYSA members *must* either cease doing business with consolidators or pay a confiscatory penalty. Indeed, since consolidators cannot ship their cargo without first obtaining empty containers and they cannot afford to pay the additional tariff when ILA-labor strips and restuffs their "foreign" containers obtained from sources other than the lines, the Rules also pose a substantial threat to the continuation of the

consolidators' businesses (A. 549-551, 719-722, 756, 797-798, 1105-1106). The only real issue, therefore, is whether the Rules have a lawful work preservation objective.

C. The Board properly found that the Rules did not have a lawful work preservation objective

1. The Rules seek to acquire work traditionally performed by non-ILA labor in other work units

a. The Board properly found that off-pier stuffing and stripping was not traditionally unit work

Rejecting the claim of ILA and NYSA that the Rules were directed solely to the primary purpose of preserving or reclaiming bargaining unit work, the Board found (A. 196-197) that the precise work in controversy – that is, stuffing and stripping LCL and LTL containers – traditionally had been performed by Consolidated's and Twin's employees and not exclusively by ILA-labor and, therefore, ILA's attempt "to acquire the work which traditionally had been performed by employees in other work units" (A. 198) was prohibited by Section 8(e).

As shown in the Counterstatement, the work of the longshore unit is principally the loading and unloading of cargo, and the unit's work was so described when the ILA was certified to represent the unit in 1953. *New York Shipping Ass'n*, 107 NLRB 364, 369 (1953). While unit longshoremen sometimes stuffed and stripped cargo at the pier which they otherwise would have handled loose for their own employers, that work was performed merely as an adjunct to the unit's principal and traditional work of loading and unloading cargo, however contained, on and off ships belonging to members of NYSA, *supra*, pp. 6-7. Contemporaneously, beginning in the late

'40s and early '50s, a consolidator, Valencia, for example, would receive cargo from its customers at its off-pier facility and stuff it into the 8 or 20 foot boxes then available, using employees outside the longshoremen's unit, employees usually represented by the Teamsters. This is work which the consolidator generates from its own customers who are not members of NYSA but have goods to ship to Puerto Rico (A. 197). During the quarter century following World War II, the size of containers increased and ships were specially designed to carry them. Nevertheless, during most of this period the distinction between the stuffing and stripping performed as a means of loading a ship, on one hand, and as a distinct business, on the other, was recognized throughout the industry.

The record shows that, since the advent of containerization, unit longshoremen did not perform the work of stuffing and stripping containers either on or off the pier for consolidators' customers, *supra*, pp. 7, 9-10. As the Board found (A. 197), "the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their own off-pier premises." Indeed, throughout this period, unit longshoremen handled consolidators' customers' freight at the piers only on limited occasions as a tactic "to bolster [ILA's] bargaining position" (A. 200). Thus, on those sporadic instances, unit longshoremen engaged in the "make work" practice of stripping cargo from the consolidator's container and restuffing it into the same or a different container, *supra*, p. 9. But, as the Board observed, that bargaining tactic cannot establish ILA's claim to the work in controversy; "it does not fall within ILA's traditional role to engage in make-work measures by insisting

upon stripping and stuffing cargo merely because the cargo was originally containerized by nonunit personnel" (A. 198).

Accordingly, the Board's decision comports with *National Woodwork*, for on this record the Board was fully warranted in concluding that "the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their off-pier premises" (A. 197). Thus, ILA's attempt to acquire the off-pier consolidation work performed by non-ILA labor was unlawful, since the work sought is "'neither unit work nor fairly claimable as unit work.'" *Sheet Metal Workers, Local 223, supra*, 498 F.2d at 696. And since "this work was not done in the past by the unit employees, . . . it could . . . not have been subject to preservation under the test laid down in *National Woodwork*." *Local 98, Sheet Metal Workers v. N.L.R.B.*, 433 F.2d 1189, 1195 (C.A.D.C., 1970).¹⁰

¹⁰ In *Local 98*, the union forced two employers of construction site workers whom it represented to cease using round pipe and adjustable elbows manufactured by another employer off the job site, and to fabricate such products at the job site using the union's members. The court affirmed the Board's finding that such conduct violated Section 8(e) and 8(b)(4)(B) because the items in question had for decades been purchased by the two employers and not fabricated at the job site except when unusual or emergency work conditions existed. *Id.* at 1192, 1195. As the Board's Trial Examiner, whom the court quoted at length, found (*Id.* at 1195):

the work which was subject to the contractual provisions here in question was not traditionally and customarily performed by the employees, and [hence] the object of the restrictions so imposed was not the preservation of unit work.

Moreover, in finding that ILA's attempt to obtain all LCL and LTL container work in the Port of New York was unlawful (A. 198), the Board properly resolved a question left unanswered in *National Woodwork*. There, the Supreme Court observed, "[w]e . . . have no occasion today to decide the question [] which might arise where the workers carry on a boycott to reach out to monopolize jobs" *National Woodwork, supra*, 386 U.S. at 630. The Board, here, was warranted in striking down the Rules because "ILA's demands . . . could only be met if the work traditionally performed off the pier by employees outside the longshoremen unit was taken over and performed at the pier by longshoremen represented by ILA" (A. 198), and such an exercise of monopoly power by ILA surely is "tactically calculated to satisfy union objectives elsewhere." *National Woodwork, supra*, at 644. On the other hand, if ILA-labor had only demanded that the steamship lines not erode their traditional unit work by, for example, prohibiting the subcontracting out of the work of stuffing and stripping the line's customers' LCL and LTL cargo, then the conduct would have been lawful. See *Meat & Highway Drivers, Local 710 v. N.L.R.B.*, 335 F.2d 709, 713 (C.A.D.C., 1964).

The Board's decision here is supported by its recently-approved decision in *International Longshoremen's and Warehousemen's Union (California Cartage Company, Inc.)*, 208 NLRB 994 (1974), enforced *per curiam* without opinion, 515 F.2d 1018 (C.A.D.C., 1975), petition for certiorari filed November 10, 1975, and pending. There, the traditional work of ILWU-represented longshoremen in the West Coast ports had been to load and unload ships, and the work of preparing cargo for shipment in various types of containers traditionally had been performed by longshoremen and by other employees outside the longshoremen's bargaining unit who

worked for trucking companies and who usually were represented by the Teamsters Union. Indeed, there, the longshoremen's employers who owned the containers had contracted with the off-pier trucking firms to stuff and strip cargo for the steamship line's customers, whereas, here, that work always had been performed by ILA-labor. In 1970 and 1972, ILWU obtained agreements obligating their employers to use ILWU-labor exclusively to stuff and strip at the piers all LCL and LTL containers which passed through the ports.

The Board in *ILWU*, as here, rejected the claim that the agreements merely sought to preserve or reclaim traditional unit work. There, as here, the Board found that the bargaining unit employees had not performed the disputed work exclusively and, accordingly, could not "require shipping companies to cease subcontracting container stuffing work to employers who did not employ ILWU members and to establish, if necessary, their own container freight stations on or adjacent to the docks within the work jurisdiction of the ILWU." *ILWU, supra*, 208 NLRB at 995. The Board also found that some of the container stuffing work which ILWU-labor sought to perform was performed for customers of companies which were not members of the multi-employer association with which ILWU bargained, and, therefore, ILWU-labor could not "put pressure on them to cease doing business with trucking, cartage, or other companies which do not employ ILWU members." *Id.* at 995. Such proscribed ILWU conduct is virtually identical to ILA's attempt to takeover the container stuffing work Consolidated and Twin generated on their own accounts.¹¹

¹¹ ILA's contention (Br. 40-41) that *ILWU* is distinguishable because, unlike in *ILWU*, here, ILA unit longshoremen merely are seeking to perform their traditional unit work, is, as we have shown *supra*, not supported by the record herein.

The Board's decision in *International Longshoremen's Association (U.S. Naval Supply Center)*, 195 NLRB 273 (1972), also supports the result here (A. 198). There, for more than 30 years the U.S. Navy had shipped break-bulk cargo from its own docks at the Supply Center. In 1964, the International Association of Machinists became the representative of the Supply Center employees who loaded and unloaded such cargo. Beginning in 1967, employees at the Center stuffed containers owned and supplied by non-government steamship companies and trucked the containers to commercial terminals in Hampton Roads, where ILA-represented longshoremen loaded them aboard container ships. ILA had a contract with an association representing the various lines and stevedoring companies doing business in the Hampton Roads port. The Supply Center was not a member of that association. The contract contained a provision similar to the Rules on Containers. In 1970, ILA notified the association that a penalty of \$1000 would be assessed for each Supply Center-stuffed container which ILA-labor did not stuff and strip. A few months later, ILA demanded in a letter to the association that its members perform all work involved in the loading at the Supply Center of commercial ships owned and controlled by association members. Shortly thereafter, ILA notified its members not to load containers onto association-member vessels which had been stuffed at the Supply Center and, conversely, not to place such containers onto trucks for shipment back to the Center.

On these facts, the Board found a violation of Section 8(b)(4)(B) of the Act. The Board found that the union's objective, as here, was not "the protection of traditional unit work of union members from diminution as the result of changes in technology. ILA members had never

handled . . . either break-bulk or container cargo at the Supply Center. Whatever the charter jurisdiction of the ILA, it had not been extended to the Supply Center." *Id.* at 274. The Board also concluded that "the precise work which is the focus of the dispute herein [had never] been performed by employees working under [the ILA] agreement" and, accordingly, the contract cannot "be used as a shield for conduct aimed not at work preservation but at acquisition of work historically performed by employees in another work unit." *Id.* See *National Woodwork, supra*, 386 U.S. at 648 (Harlan, J., concurring).¹² See also *Local 98, Sheet Metal Workers v. N.L.R.B., supra*.

b. Petitioners' contentions are without merit

Contrary to petitioners' contention (ILA Br. 18-24; NYSA Br. 28-32), the Board did not err when it found that the precise work "in controversy here is the LCL and LTL container work performed by Consolidated and Twin at their own off-pier premises" (A. 196). For the fact that bargaining unit longshoremen and related craftsmen, in conjunction with their traditional and principal work of loading and unloading ships, have historically stuffed and stripped containers for their employers' customers, and possess the skills to perform all container stuffing work, does not establish that the container stuffing work they now seek is fairly claimable by those employees. As in *U.S. Naval Supply Center and California Cartage, supra*, the precise work which is the focus of the dispute is not all container stuffing work longshoremen are capable of performing,

¹² The contention of ILA and NYSA (ILA Br. 37-40; NYSA Br. 37-39) that *U.S. Naval Supply Center* is distinguishable because here, unlike that case, ILA did not seek to represent the employees of the primary employer (Consolidated or Twin and the U.S. Navy, respectively), is wide of the mark. For the crucial common thread in each case is that unit employees were seeking to perform precise work which they traditionally had never done.

but, rather, it is the work which they have performed in the past. And, here, the record shows, the unit employees have never stuffed and stripped containers for consolidators' customers. Indeed, as discussed *infra*, pp. 34-36, the unit employees here abandoned any claim to this work in 1959 in favor of employees in other, wholly unrelated bargaining units who have historically, traditionally, and exclusively performed that work.

In an analogous situation, where the same contention was raised, a unit of on-site truckdrivers, who traditionally made only nominal deliveries to and from the site, sought to acquire all delivery work, and the Board remarked (*Local Union No. 282, Teamsters (D. Fortunato, Inc.)*, 197 NLRB 673, 678 (1972):

. . . the driving work which the unit employees here perform is considerably more limited than that which they seek to preserve. The fact that the driving of one truck may well be similar to, and require like skills as, the driving of any other truck does not persuade us that all driving work is therefore "fairly claimable" by a unit of drivers . . . particularly where, as here, the clause seeks protection of work historically performed by employees in other work units.

Indeed, petitioners' claim (ILA Br. 18; NYSA, Br. 30) that the Board focused upon the wrong bargaining unit work finds no support in *National Woodwork*. For, just as the Supreme Court there focused not upon all the carpenters' skills, but on the precise work of hanging pre-cut versus on-site-cut doors, the Board, here, properly limited its concern to the stuffing and stripping of consolidators' containers, for that was the work ILA claimed the right to perform. But unlike the carpenters who had cut doors on the site in the past, longshoremen have never stuffed containers at the piers for consolidators' customers (A. 198). And the fact that longshoremen have stuffed containers for their direct employers, and

possess the skills to do so for consolidators, proves too much. For, as the Board observed here (A. 200-201):

We recognize that the economic personality of the industry is marked by the absence of a distinction in the essential character of the work of stuffing and stripping, whether it is performed for full-load shippers or by consolidators handling LCL and LTL loads. Thus, Consolidated and Twin, as customers of the shipping companies, are no different in this respect than the full-load customers to whom the shipping companies furnish containers. Although ILA does not now claim the work of stuffing and stripping shippers' loads,^[13] the logic of its position would support a claim for all container work, without regard to the identity of the competing employees. As we noted in *California Cartage Company* [*supra*, 208 NLRB at 996], "a boycott to enforce a claim to stuff shippers' loads and door-to-door deliveries would have an enormous impact on the shipping industry."^[14]

Contrary to NYSA's claim (Br. 41), the Board was not relying upon this hypothetical situation to "bootstrap" its conclusion. It was simply recognizing the argument for what it was and observing the Supreme Court's admonition in *National Woodwork* to examine "all the surrounding circumstances," including "the economic personality of the industry" (386 U.S. at 644, n. 38).

Nor, contrary to the petitioners' claim (ILA Br. 27-29; NYSA Br. 43-44), did the Board fail to follow the well-established "work reacquisition" and "fairly claimable work" doctrines. In *American Boiler Manufacturers Ass'n v. N.L.R.B.*, 404 F.2d 547 (C.A. 8, 1969), cert. denied, 398 U.S. 960 (1970), the court affirmed the Board's determination that the conduct

¹³ "Shippers loads" are containers stuffed by a manufacturer's employees at his premises and loaded intact onto vessels by ILA-labor at the pier (A. 133; 74, 85, 899).

¹⁴ About 80 percent of the containers passing through the Port of New York are "shippers loads" which ILA-labor currently does not stuff and strip (A. 133; 91, 894).

involved therein was primary, and held that a union could lawfully strike to "reacquire as well as preserve unit work" (404 F.2d at 551). However, the court made clear that its conclusion did not extend to agreements or union pressure "to acquire work which unit employees had never performed or work which they may have performed in the past but have completely lost before the clause was negotiated. We hold that the term 'traditional work' includes work which unit employees have performed and are still performing at the time they negotiated a work preservation clause." *Id.* at 552. Therefore, *American Boiler* is inapposite, for here, unlike that case, ILA-labor never stuffed and stripped containers for consolidators' customers.

The petitioners' reliance on the so-called "rack-jobbing case," *Canada Dry Corp. v. N.L.R.B.*, 421 F.2d 907 (C.A. 6, 1970), is similarly misplaced (ILA Br. 33-34; NYSA Br. 44). In that case, the union merely ended an anomalous practice whereby non-unit employees entered upon the primary job site and performed work which was identical to the principal work being contemporaneously performed by the unit employees. Thus, the disputed work (shelving certain brand name products in retail supermarkets) was identical to the traditional work of the unit employees, and the unit employees in fact did the shelving and servicing for the vast majority of grocery products, including, to a limited extent, the very brand name products in dispute. "[I]t is unrealistic to define the area of . . . legitimate job protection efforts according to brand name or supplier," and in the circumstances of that case, the union's claim could not "in any realistic sense [be regarded as] an attempt to . . . acquire new jobs tasks." *Id.* at 909. Here, by contrast, ILA-labor sought to acquire new

jobs which they had never performed. The work in controversy always had been performed away from the docks by non-unit employees, and the fact that the same skills are involved does not answer the question: Was ILA seeking to preserve work to which its members in the unit were entitled?

Finally, *Meat & Highway Drivers, Local 710 v. N.L.R.B.*, 335 F.2d 709 (C.A.D.C., 1964), also cited by petitioners (ILA Br. 30; NYSA Br. 44), is also distinguishable on its facts. Unlike the unit employees there, who historically exclusively performed the disputed work (local deliveries to customers in the Chicago area) which their employers took away from them and gave to units of over-the-road drivers employed by the same employers, the longshoremen's bargaining unit employees here never exclusively performed container stuffing work for consolidators. Rather, that work was always performed by non-unit employees from the inception of containerization. Moreover, here, ILA-labor abandoned any claim to the work, whereas in *Meat & Highway Drivers*, the union immediately asserted its claim to the work and promptly engaged in an effort to preserve its remaining work and to recapture the work already lost.

In brief, the Board focused sharply and properly on the actual work which the bargaining unit was seeking to perform, not upon a broad spectrum of tasks the unit had the ability to perform, and, having found that ILA-labor had never performed that work, correctly concluded that the Rules on Containers violated Section 8(e). Thus, contrary to petitioners' contention (ILA Br. 20; NYSA Br. 42-43), the Board has not engrafted upon *National Woodwork* the additional requirement that in order to preserve, reacquire, or fairly claim disputed work, the bargaining

unit employees must "currently, continuously and exclusively" (*American Boiler, supra*, 404 F.2d at 551) perform it. For if the work had never been performed by the unit employees, they cannot successfully assert a work preservation claim.

2. The Rules seek to acquire work which the bargaining unit abandoned in 1959

a. Substantial evidence supports the Board's finding that ILA abandoned the disputed work

The Board's finding of a violation is also supported, we submit, by the Board's additional finding that whatever "superior claim [ILA had] prior to 1959 to the stuffing and stripping work here in controversy" was abandoned "by its 1959 contract with NYSA" (A. 199). Thus, the Rules on Containers cannot now be utilized "to acquire . . . work which [unit employees] may have performed in the past but have completely lost before the clause was negotiated." *American Boiler, supra*, 404 F.2d at 552.

As shown in the Counterstatement, in 1959, when it was common practice for consolidators to stuff LCL containers for their customers off the piers, NYSA and ILA executed an agreement, *supra*, p. 8, whereby ILA abandoned any claim to perform such stuffing and stripping work exclusively at pierside. The agreement in Section 8(a) gave any NYSA member "the right to use any and all type of containers without restriction or stripping by the union." In exchange for this right, NYSA members agreed to use ILA-labor to stuff and strip cargo shipped by the steamship line's direct customers, be it a shippers' load or LCL and LTL

freight. Thus, the 1959 contract provided in Section 8(c) that "[a]ny work performed in connection with the loading and discharging of containers for employer members of NYSA which is performed in the Port of Greater New York whether on the piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rate."

Contrary to petitioners' contention (ILA Br. 10; NYSA Br. 15-16, 48), Section 8(c) of the 1959 contract did not preserve the right of ILA-labor to strip and stuff consolidators' containers. For, as the Board found (A. 199-200), consolidators work for themselves, not "for employer members of NYSA," and since consolidators such as "Consolidated and Twin are customers rather than subcontractors of NYSA, their containers obviously do not fall within the purview of Section 8(c)" (A. 729, 751).

In exchange for relinquishing whatever arguable claim ILA-labor might have had in 1959 to perform the consolidators' work at the piers, ILA received a royalty for its members for each non-ILA-labor-stuffed consolidators' container which ILA-labor loaded or unloaded directly aboard ship. Thus, the contract provided in Section 8(b) for payment "on containers which are loaded or unloaded [i.e., stuffed and stripped] away from the pier by non-ILA labor." Indeed, the arbitration panel which established the amount of the royalty in November 1960 recognized the same distinction which the Board found here. That is, ILA-labor was to receive wages for stuffing and stripping steamship line's containers on the line's shipping customers' account, and was to receive a royalty for loading consolidators containers directly aboard ship without stuffing and stripping (or stripping and restuffing) their freight. Thus, as the panel found (A. 334):

Containers may be loaded or stripped on the pier by ILA-labor. They may also be loaded or stripped away from the pier by non-ILA-labor. The latter, commonly, called "shipper-loader containers," are the subject of the present controversy, since ILA has made no claim [for a royalty] as to containers which are loaded or stripped on the piers by ILA-labor.

Petitioners claim (ILA Br. 9-10; NYSA Br. 15-16) that the 1959 agreement only recognized a distinction between "shippers loads," *supra*, n. 13, upon which a royalty was paid and which were not rehandled on the pier, and all LCL containers, upon which no royalty supposedly was paid and which ILA-labor allegedly was entitled to handle exclusively on the piers, finds no support in the contemporaneous arbitration award. Indeed, petitioners appear to be redefining the terms "shippers load" and "shipper-loaded containers" as used in the arbitration report. The former term describes cargo stuffed by a manufacturer at his place of business, whereas the arbitration panel clearly used the term "shipper-loaded containers" to describe all containers stuffed by non-ILA-labor away from the pier, whether by manufacturers or consolidators. Thus, the critical distinction made in Section 8 was between containers stuffed with and without ILA-labor and not between "shippers loads" and LCL containers (A. 381-382, 1066-1067).

The record supports the Board's finding that ILA-labor abandoned any claim to the work at issue in Section 8 of the 1959 agreement. From 1959 to early 1973, as shown in the Counterstatement, ILA-labor loaded first Valencia, and then Consolidated and Twin containers directly aboard ship without rehandling at pierside the LCL cargo already consolidated off the pier. Except for brief periods during contract negotiations, bargaining unit members only stuffed and stripped loose cargo directly on behalf of the steamship line's accounts. Indeed, the collective bargaining agreements

extant between 1959 and 1968 were silent concerning the handling of consolidators' containers on the piers (A. 891). Moreover, even when the 1969 Rules on Containers came into being, ILA-labor continued to load consolidators' containers directly aboard ship without stripping and restuffing the cargo. Accordingly, as the Board observed (A. 200), "this adherence to the plain meaning of the contract's provisions confirms the view we have taken [that ILA] abandoned [its claim to the stuffing and stripping work here in controversy] by its 1959 contract with NYSA."

The Board's finding is also supported by the absence of noticeable disruptions in Consolidated's and Twin's consolidation operations which would have occurred had ILA-labor, in fact, stuffed and stripped, or stripped and restuffed consolidators' containers during the 14-year period between 1959 and 1973. Thus, the use of second containers to transport overflow freight should have been common, since as a practical matter it is impossible to remove and repack the 500 to 1000 pieces of freight in each LCL container without creating an excess that cannot fit back in the original container (A. 713-714, 732-733, 812-813, 918-919). Likewise, when freight is stripped from one container and restuffed into the same, or a different container, the sequence in which the freight was loaded by the consolidator should, of necessity, be changed (A. 716-717, 734-736). Also, claims for cargo damage and loss should have proliferated with on-pier rehandling, but that too did not become a problem until 1973 — indeed, the FAK tariff used by consolidators assumes low breakage and pilferage and requires off-pier handling of the freight, *supra* (A. 715, 1169-1170). And, significantly, throughout this period, the original seals placed on the container by the consolidator should have been broken and new,

steamship line's seals affixed by ILA-labor by the time the container arrived in Puerto Rico, for it is simply impossible for bargaining unit employees to strip a container in New York without breaking the consolidator's seal (A. 682(2)-682(126), 683-693, 716, 739, 1140). Finally, since containers delivered to the pier in New York even as late as a few hours before sailing constantly sailed on time, it is clear that they were not rehandled since it takes 20-24 manhours to strip and restuff a 40-foot long container (A. 695, 714-715, 736-738, 916).

The Board's reliance on the fact that ILA's conduct amounts to abandoning its claim to the work in 1959 is supported also by the Board's decision in *ILWU(California Cartage)*, *supra*. There in 1960, when containerization already had begun in the West Coast ports, ILWU agreed to divest itself of various work practices which impeded efficient operation of the ports in exchange for a multimillion dollar payment into a modernization and mechanization fund. The union agreed, *inter alia*, to load containerized cargo delivered to the piers aboard ship without first reloading it into different containers. As noted above, p. 27, in 1970 and 1972 ILWU sought to acquire this container stuffing work for its members, but the Board found those agreements prohibited by Section 8(e) because, in part, "[t]o a large extent, the make-work rights claimed by longshoremen with respect to cargo placed on the dock were effectively bargained away in 1960." *ILWU*, *supra*, 208 NLRB at 996, enforced, 515 F.2d 1018 (C.A.D.C., 1975).¹⁵

¹⁵ The contention of ILA and NYSA (ILA Br. 42; NYSA Br. 48-49) that *ILWU* is distinguishable because ILA, unlike ILWU, never bargained away its rights to the disputed work, is without merit because, as we have shown, *supra*, pp. 34-36, in 1959 ILA also waived any claim it might have had to the work.

Thus, as this record amply demonstrates, ILA's purpose in enforcing the Rules on Containers in 1973 was not as "a shield carried solely to preserve the members' jobs" but rather, "as a sword" to acquire work to which the bargaining unit was not entitled. *National Woodwork, supra*, 386 U.S. at 630. For even assuming that the history of the work traditions in the industry fails to establish that the work at issue was never bargaining unit work, this is not a case where workers were seeking to protect themselves from technological change and "against their employers' efforts to abolish their jobs." *Id.* at 640. In 1959 ILA agreed that NYSA could abolish their jobs, at least to the extent that they involved off-pier consolidators containers, and since then ILA-labor has limited itself to handling containerization work for NYSA-member companies' own shippers. To permit ILA-labor now to reach out and force consolidators work to the piers, after it bargained away its right to that work, surely would do violence to the concept of "work preservation" carefully defined in *National Woodwork*.

b. Petitioners' contentions are without merit

There is no merit in the contention of ILA and NYSA (ILA Br. 24-25; NYSA Br. 45-49) that the record fails to support the Board's finding that ILA abandoned its claim to the consolidators' work in 1959. As shown above, pp. 34-36, the Board's construction of Section 8 of the 1959 agreement was reasonable, and, indeed, the parties own arbitration panel reached the same conclusion just a few months after the 1959 contract was executed. The fact that ILA-labor did not seek to stuff and strip consolidators containers from 1959 through early 1973 is persuasive evidence that the industry understood the 1959 agreement exactly the way the Board construed it here. Moreover, as late as 1968, NYSA's

position was that its "present contractual rights [are] to use any and all types of containers without restriction by the union," *supra*, p. 10.

None of the inconclusive evidence relied upon by petitioners compels a finding that ILA did not abandon the work in dispute in 1959. Thus, their exhibit No. 10 (A. 887-888, 284) supposedly reflects NYSA's position in 1962. But, significantly, that very document distinguishes between "loading or discharging cargo" by consolidators' employees, and "contain[er[s which] must be loaded and unloaded by ILA labor." In other words, that document supports the Board's view. For as to consolidators, non-ILA labor stuffs and strips *cargo*, and ILA-labor loads and unloads *containers*. Moreover, that document, while dated, is unsigned and is not on any official NYSA letterhead.

The fact that ILA-labor stripped and restuffed consolidators' containers (NYSA Br. 46) on a few limited occasions in 1967 and 1968, and again in 1971 at times coinciding with contract negotiations does not prove that ILA-labor had the *right* to perform that work (A. 154, 200). The Board properly found that this sporadic "make work" was a bargaining tactic to bolster ILA's negotiating position, *supra*, pp. 9, 25. ILA's contention (Br. 12-13) that its members would have performed this work throughout this period but for the devious practices of NYSA members to evade the Rules, simply does not establish that the 1959 agreement preserved such work for its members (A. 154). For the critical fact is that the checkers who allegedly falsified the shipping documents attesting to the stripping and restuffing of consolidators' containers, and who could have policed the 1959 agreement, are represented by the ILA (A. 906, 930, 964, 968, 980). And, as the record shows, when ILA really intended to police the Rules, it was able to do so dramatically in 1973, after a 14-year period of uninterrupted handling

of consolidator's containers, *supra*, pp. 9, 12, 14-15. It, not the steamship lines, clearly was in the best position to know if the 1969 agreement was being followed. Such sporadic performance of "make work" does not overcome the convincing evidence of waiver. See *Local 98, Sheet Metal Workers, supra*.

Indeed, NYSA, in effect, conceded in its brief to this Court in *Intercontinental Container Transport Corp. v. NYSA and ILA*, 426 F.2d 884 (C.A. 2, 1970) (Docket No. 34758), that the 1959 agreement did not preserve any claim to the work in dispute here. Thus, NYSA asserted in *ICTC* that the "work preservation" rules — which it now claims have existed since 1959 (Br. 47) — were "forced upon it and its members by a 56 day strike" of ILA longshoremen in 1968, and were opposed "in the lengthy negotiations of 1968-1969" (NYSA Brief in *ICTC* at 2-3).¹⁶

¹⁶ In relevant part, NYSA argued to this Court in *ICTC* that ILA (Id. at 9-10):

has grieved, complained and struck for more than 12 years [i.e., since the 1959 agreement was executed] in order to preserve a part of the work which has traditionally and historically been performed on the piers where ships are loaded or discharged. . . . With the advent of containerization the ILA complained that cargo from different shippers, which did not make up a full load and which ordinarily would have been sent to a deepsea pier or terminal to be handled by longshoremen, was being diverted away For the past 11 years, the parties have engaged in a lengthy and costly dispute over containerization. During the collective bargaining agreements of 1959, 1962, 1964 and 1968 the ILA demanded the stuffing and stripping of all containers at deepsea piers and terminals. Hundreds of grievances, dozens of work stoppages and court litigation arose over the issue When the 1968 negotiations did not result in a settlement the ILA began a long strike When the Taft-Hartley injunction expired . . . and the containerization issue was not resolved, longshoremen struck . . . for 56 days The strike was settled when the parties agreed to the [Rules on Containers] which provide valid work preservation provisions . . . (Emphasis added.)

3. This Court's decision in *Intercontinental Container* does not dispose of the factual and legal issues in this case

Contrary to petitioners' contention (ILA Br. 34-36; NYSA Br. 32-39), this Court's decision in *Intercontinental Container*, *supra*, is not factually and legally dispositive of the origins, purposes, and objectives of the Rules on Containers.

In *ICTC*, plaintiff, an off-pier consolidator of LCL cargo which employed ILA labor, complained under the Sherman Act that NYSA and ILA had combined and conspired to exclude it from membership in NYSA. Its contention was, not that the Rules on Containers possessed an unlawful work acquisition objective, but rather that the Rules were used as a device to establish the classic union-employer anti-competitive combination with the Supreme Court held in *Allen Bradley Co. v. Local U. No. 3, I.B.E.W.*, 325 U.S. 797, 807-810 (1945), violated the Sherman Act. The holding by this Court in *ICTC* was that the district court had erred by granting plaintiff a preliminary injunction because *ICTC* had not shown that it could establish the requisite anti-competitive conspiracy at trial. As this court found (*ICTC*, *supra*, 426 F.2d at 888):

Thus it appears that, far from aiding and abetting a violation of the Sherman Act by a group of business men, the union here, acting solely in its own self-interest, forced reluctant employers to yield to certain of its demands

— the very antithesis of an unlawful anti-competitive combination under the Sherman Act.

The issue of whether the 1969 Rules violated Section 8(e) of the Act was not before this Court in *ICTC*. For *ICTC* in its brief (Br. 17) unequivocally stated:

ICTC has not attacked the validity of these Rules, for they appear to be job-saving and would be just that if properly utilized, but it is the illegal anti-competitive implementation by [ILA and NYSA] which ICTC seeks to enjoin. ICTC has not alleged in the complaint the Rules on Containerization are, per se, anti-competitive or in restraint of trade, though that might be the case. What we do maintain is that these rules are being used as a smoke screen to shield the actions of the [ILA and NYSA] to eliminate competition.

Thus, ICTC was not claiming that the 1969 Rules were violative of the Sherman Act. It conceded their validity and claimed only that the Rules were used as a guise to keep ICTC out of NYSA. Accordingly, the issue squarely posed in the instant case was not decided in *ICTC*.

There are, in addition, other compelling reasons why *ICTC* does not dispose of the instant case. First and most significantly that case did not involve a construction of the National Labor Relations Act, which the Board in the first instance must apply to a particular set of "surrounding circumstances." *National Woodwork, supra*, at 644. Neither the Board nor the charging parties were a party to that proceeding and, therefore, the doctrine of *res judicata* cannot be applied here. *C.I.R. v. Sunnen*, 333 U.S. 591, 597 (1948). Secondly, the Rules before the Court in *ICTC* in 1970 were supplemented in 1973 by a clause which, in effect, prohibits lines from supplying empty containers to consolidators, and it was the maintenance and enforcement of the supplemented Rules which the Board prohibited here. Finally, the standard for review here is whether the Board's order is supported by substantial record evidence (*Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951)), based on a full hearing, whereas, in *ICTC*, the question, based entirely on affidavits, was whether ICTC had a likelihood of success at trial.

In sum, the issue posed here was not before the court in *ICTC*, and, in this difficult area of labor law, the Board's expertise was not available to this court in *ICTC*. Moreover, as shown above, NYSA and ILA have taken positions on a critical aspect of this case (abandonment in 1959) significantly at variance with their positions before this court in *ICTC*.¹⁷

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT ILA VIOLATED SECTION 8(b)(4)(ii)(B) OF THE ACT BY THREATENING TO ASSESS AND BY ASSESSING LIQUIDATING DAMAGES AGAINST NYSA-MEMBER STEAMSHIP LINES SEA-LAND, SEATRAN, AND TTT.

As shown in the Counterstatement, in early 1973 liquidated damage penalties exceeding \$100,000 were assessed against Sea-Land, Seatrain, and TTT for handling Consolidated and Twin containers without stripping and restuffing their containers as required by the Rules on Containers. A notice announcing the assessment of these penalties was distributed to all NYSA members. As a result of those penalties, on March 15 and 25, respectively, Sea-Land and Seatrain stopped supplying empty containers to

¹⁷ There is no merit in the claim of NYSA (Br. 20) that the General Counsel's refusal to issue a complaint alleging violations of Sections 8(b)(4)(B) and 8(e) with respect to the 1969 Rules constitutes a Board finding that the Rules are lawful. On September 24, 1969, the same regional office which issued the instant complaints refused to issue a complaint on charges filed by ICTC alleging that the 1969 Rules violated the Act, and on October 16, 1970, then General Counsel Arnold Ordman (the Administrative Law Judge here) upheld the Regional Director's determination (A. 269-273). But it is beyond question that this administrative decision not to issue the complaint is a matter within the sole discretion of the General Counsel and, of course, is not reviewable. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-139 (1975). It is not a finding by the Board of no violation of the Act. Indeed, if a complaint is not forthcoming, "no proceeding before the Board occurs

[footnote continued]

Consolidated and Twin, and TTT continued only to handle "foreign" containers which were subject to the "make work" of stripping and restuffing.

Thus, the evidence is undisputed that ILA threatened, restrained, and coerced these employers to cease doing business with Consolidated and Twin. Since the Union's object was to enforce the 1973 Rules on Containers which, as we have shown above, violate Section 8(e) of the Act, the pressures exerted by ILA were plainly unlawful under Section 8(b)(4)(ii)(B) of the Act. *Local Union No. 98, Sheet Metal Wkrs. v. N.L.R.B.*, *supra*, 433 F.2d at 1196-1197; *N.L.R.B. v. Local 282, IBT*, 344 F.2d 649, 651 (C.A. 2, 1965).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court enter a judgment denying the joint petition for review and enforcing the Board's order in full.

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¹⁷ [footnote continued from preceding page]
at all." *Id.* at 139. As this Court observed in an analogous situation, "the proceeding . . . was administrative only, neither formally adversarial nor like a trial. As such, it has no collateral estopped effect." *I.U.E. v. General Electric Co.*, 407 F.2d 253 (1968), cert. denied, 395 U.S. 904 (1969) (citations omitted). Furthermore, that regional office decision did not involve a challenge to the 1973 Rules.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

INTERNATIONAL LONGSHOREMEN'S)
ASSOCIATION, AFL-CIO and)
NEW YORK SHIPPING ASSOCIATION,)
INC.,)

Petitioner,)

v.)

No. 75-4266 and 76-4003

NATIONAL LABOR RELATIONS BOARD,)

Respondent,)

and)

TWIN EXPRESS, INC.,)

Intervenor,)

and)

CONSOLIDATED EXPRESS, INC.,)

Intervenor,)

and)

TRUCK DRIVERS UNION LOCAL)

807, IBT,)

Intervenor.)

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's
offset printed brief in the above-captioned case have this day been
served by first class mail upon the following counsel at the addresses
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Dated at Washington, D. C.

this 20th day of February, 1976.

